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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 76

HOWARD DORTCH, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 66-68) is reported at 203 F. 2d 709.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1953 (R. 68-69). The petition for a writ of certiorari was filed on May 18, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Where the jury disagreed as to petitioner's guilt under an indictment which was later dismissed upon the Government's motion when the case was called for trial again but before any further proceedings were had, does a conviction under a second indictment containing the same charge subject the petitioner to double jeopardy in violation of the Fifth Amendment.

STATEMENT

An indictment in two counts under 18 U.S.C. 1992 was returned against petitioner and one Riley in the United States District Court for the Western District of Kentucky charging them with dynamiting a railroad bridge used in interstate commerce (R. 10-11). On the trial on November 15, 1950, Riley was convicted, but the jury were unable to reach a verdict as to petitioner. When the case came on for trial again on April 10, 1951, petitioner being present with his counsel, the government attorney announced that the case had been called for trial on three previous occasions, that on the fourth the trial resulted in a hung jury as to petitioner, and that the chief witness for the Government had now repudiated, and would repudiate, if called as a witness, all statements made by him involving petitioner. The District Court thereupon "Ordered that this case be and the same is hereby dismissed." (R. 12-13.)

On May 19, 1952, petitioner was again indicted, this time in one count identical with the second count of the indictment previously dismissed (R. 4). Petitioner's motion to dismiss this second indictment on the ground of double jeopardy under the Fifth Amendment was overruled (R. 5-8). The trial proceeded, petitioner was found guilty, and was sentenced to ten years' imprisonment (R. 17-19). On appeal the conviction was unanimously affirmed (R. 68-69).

ARGUMENT

There is no merit to petitioner's contention that forcing him to stand trial under the second indictment, after dismissal of the first, placed him in double jeopardy in violation of the Fifth Amendment.

No jeopardy attached as a result of the failure of the jury to return a verdict as to the petitioner in the November 15, 1950, trial upon the first indictment, for it is well settled that if a jury disagrees as to a verdict in a criminal trial, a second trial is not in violation of the double jeopardy clause. *United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U.S. 263, 297-298; *Dreyer* v. *United States*, 187 U.S. 71, 85-86; *Keerl* v. *Montana*, 213 U.S. 135, 138.

Nor did any jeopardy attach as a result of the dismissal of the indictment by District Judge Swinford on April 10, 1951, upon the motion of government counsel. That dismissal, as the court

below held (R. 67-68), was without prejudice and, accordingly, was equivalent to a *nolle prosequi*. Indeed, it was Judge Swinford who, necessarily interpreting his own order, overruled petitioner's motion, based upon that order, to dismiss the second indictment (R. 5-8). Unlike an acquittal, a *nolle prosequi* or dismissal without prejudice does not free the accused from further prosecution for the offense charged, and is not a bar to a second indictment covering the same matter. Cf. *Dealy* v. *United States*, 152 U.S. 539, 542; *United States* v. *Fox*, 130 F. 2d 56, 58 (C.A. 3), certiorari denied, 317 U.S. 666; *District of Columbia* v. *Buckley*, 128 F. 2d 17, 20 (C.A. D.C.), certiorari denied, 317 U.S. 658. See also *Hensley* v. *United States*, 160 F. 2d 257, 258 (C.A. D.C.), certiorari denied, 331 U.S. 817; *Amrine* v. *Tines*, 131 F. 2d 827, 834-835 (C.A. 10).

The dismissal of the first indictment without prejudice was completely proper. No proceedings had been begun when the case was called on April 10, 1951, and no jeopardy could have attached to the petitioner. Further, there is nothing in the record to show that petitioner objected to the dismissal, or insisted that he be tried only on this indictment. The fact that the Government obtained a new indictment against petitioner is immaterial. Cf. *Lynch* v. *United States*, 189 F. 2d 476, 478-479 (C.A. 5), certiorari denied, 342 U.S. 831, holding that where a mistrial had been declared, the Government could try the

accused again on the same, or a new indictment for the same offense, and the mistrial was not a bar to a subsequent trial.

Since neither the jury disagreement of November 15, 1950, nor the *nolle prosequi* of April 10, 1951, was a bar to a second prosecution, the concurrence of both these events did not operate to create such a bar. The second indictment was admittedly returned before the statute of limitations had run. The fact that testimony (R. 41-46), which was favorable to the Government and strengthened the prosecution's case, came into existence subsequent to the first trial, does not alter the situation. Inasmuch as petitioner had never been acquitted, the Government properly brought before the court the proof of his guilt.

CONCLUSION

This case was correctly decided under settled principles of law, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1953.

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